

Texas Elder Law FaxLetter

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A FREE BUSINESS AND LEGAL UPDATE OF CURRENT EVENTS AFFECTING THE ELDERLY ♦ MAY 2005 EDITION

MEDI-MINUTES

Transfer Penalty Divisor Likely to Increase

As reported in the March issue of the Texas Elder Law FaxLetter, it is anticipated that the transfer penalty divisor (used to determine the duration of transfer penalties for gifts or uncompensated transfers) will increase when the new gifting rules (which allow partial month penalties as reported in the March issue) become effective. This is expected to be around October 1, 2005. It is also anticipated that the divisor will be increased from the present figure of \$2908 to around \$3600. Under the current rules, the penalty period begins with the month of the transfer and there is a round-down. However, under the new rules the transfer penalty could begin from the actual date of the transfer, and the determination of penalty would be in the form of days.

Thus, under the current rules, if one makes a gift of \$5400 on April 29, 2005 and there were no other uncompensated transfers in the look-back period causing an existing transfer penalty, the transfer penalty would expire on April 30, 2005 ($5400/2908 = 1.8$ rounded down to 1 month being the month of transfer). Under the new rules, the penalty would expire around 6 weeks after the transfer since $5400/3600 = 1.5$ months. The state does not plan to permit grandfathering of transfers made under the existing rules.

MONEY TALKS

Interpretation of New Annuity Rule Could Possibly Kill All "Medicaid Annuities"

Last September, the Texas Health and Human Services Commission (HHSC) implemented a new annuity rule whereby an irrevocable annuity will be considered a countable resource based on its discounted value of the "gray" market unless:

1. the principal is paid out in equal monthly installments;
2. the interest is paid in either monthly installments or in amounts that result in at least annual increases in monthly installments;
3. it is guaranteed to return the principal in

its entirety (plus reasonable interest) to the payee during his or her lifetime;

4. it is issued by an insurance company licensed to do business in Texas; and
5. it names the State of Texas as residuary beneficiary to the extent that medical assistance payments were made on the decedent's behalf during his or her lifetime (unless purchased by the community spouse). If all of the foregoing requirements are met, then such an annuity should not count as a resource.

Texas is now an "income first" state, meaning the non-countable resource income of both spouses must be considered prior to expansion of the protected resource amount. Because of this, some anticipate an increase in the purchase of these annuities, since fewer people may be able to obtain Medicaid eligibility. However, it has been reported that the HHSC Houston regional counsel has determined that a "reasonable" rate of return for these annuities should be a 1 year certificate of deposit rate. But unless the annuitant is relatively young, it will rarely make such a return. Such annuities are used more for protection than investment. Should the Houston decision stand, it would effectively kill all Medicaid annuities. HHSC has stated it will review each case to determine a reasonable rate of return. So at the very least, the purchase of this type of annuity could result in problems for Medicaid applicants and their advisors relying on the use of this product to help qualify them for Medicaid.

NATIONAL NOTES

U.S. Governors Consider Medicaid Reform

The nation's governors are drafting a health care reform document to present to Congress that may ask for tighter restrictions on asset transfers commonly used by seniors to meet Medicaid's eligibility requirements, the *Associated Press* reports.

While the draft statement has not been finalized, it is expected to include the following provisions:

- Adding deductibles or co-pays for medical care for Medicaid recipients.
- Making it more difficult for seniors to transfer their assets to relatives or others

so they fall within Medicaid eligibility requirements for long-term care. One proposal would allow states to examine a person's finances in greater detail in the interest of seeking reimbursement for government-provided care.

- Finding ways to discourage businesses from dropping health insurance or shifting employees to Medicaid, possibly through tax credits.

Government officials have called Medicaid "unsustainable" in its present form, and many governors believe it, not Social Security, is the country's most pressing financial issue.

Medicaid now pays for two of every three nursing home patients in the country. It is the leading payer of both mental health and HIV/AIDS services. One out of nine people in the U.S. are on Medicaid, which is expected to cost more than \$300 billion this year.

Source: *Associated Press*, 4-25-05

E-MAIL VS. FAX

Based upon the response to my recent survey on receiving this FaxLetter by e-mail rather than by fax, I have determined that, for the time being, there is not a large enough demand for e-mail distribution. If I should receive a significant number of requests for such a change, I may begin email distribution some time in the future. But for the time being, I will continue fax distribution.

I want to extend my gratitude to those who participated in the survey and assure you that your responses have been heard. I will continue to do everything I can to see that you receive the FaxLetter in the most convenient and efficient manner possible.

NO APRIL FAXLETTER

Due to my recent workload, there was no April 2005 issue of the Texas Elder Law FaxLetter.

OUT & ABOUT

Michael B. Cohen is scheduled to speak on the new Estate Recovery rules for Senior Adult Services at a conference set for June 4, 2005 at 9:00 a.m.